In the

Supreme Court of the United States

October Term, 1947

No. 216

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN, AND BRIEF IN SUPPORT THEREOF

ROGER C. MINAHAN,
VICTOR M. HARDING,
Counsel for Petitioner.

THE GILMAN PRESS, MADISON, WIS.

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To the Honorable The Supreme Court of the United States.

Your petitioner, Algoma Plywood and Veneer Co., respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This is a proceeding to review an order of the Wisconsin Employment Relations Board (R. p. 8). That Board found the Petitioner (Algoma Plywood and Veneer Co.) had committed an unfair labor practice, under Sec. 111.06 (1) (c) of the Wisconsin Statutes, in discharging a certain employee on January 14, 1947, pursuant to a union

security provision contained in a labor contract negotiated between Petitioner and Local Union No. 1521, Carpenters and Joiners of America (AFL). (R. p. 7-8). This Union had previously been certified as bargaining agent of Petitioner's employees by the National Labor Relations Board (R. p. 19). The Wisconsin Employment Relations Board ordered Petitioner to reinstate the discharged employee, with back pay, and to cease and desist from carrying out the union security provision of its labor contract on the ground that such provision contravened the Wisconsin statutes (R. p. 8-9).

II.

BASIS OF JURISDICTION TO REVIEW

The basis upon which this court has jurisdiction to review the judgment of the Wisconsin Supreme Court is Sec. 237 (b) of the Judicial Code, in that the validity of Sec. 111.06 (1) (c) of the Wisconsin Statutes, in its application to Petitioner, is drawn in question on the ground that it is repugnant to Sec. 8 (3) and Sec. 10 (a) of the National Labor Relations Act (29 U. S. C. A. 158 and 160). The jurisdiction of the State Board in this case was challenged at every stage of the proceedings, originally by motion to the State Board (R. p. 40), and at each subsequent stage by assignment of error. (See statements in opinions of Circuit and Supreme Court, R. p. 46; 56).

III.

QUESTON PRESENTED

Does the Wisconsin Employment Relations Board have jurisdiction of unfair labor practice charges against an employer in interstate commerce, when Congress has regulated the same conduct through the National Labor Relations Act, and when the National Labor Relations Board has previously asserted its jurisdiction over the employer's labor relations in representation proceedings?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(a) *The Wisconsin Supreme Court hds decided a federal question of substance in a way probably not in accord with applicable decisions of this court.*

The applicable decisions of this court are:

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767

Hill v. Florida, 325 U. S. 538.

(b) *The Wisconsin Supreme Court has decided a federal question of substance not theretofore determined by this court.*

In deciding that the Wisconsin Employment Relations Board has jurisdiction over unfair labor practice charges against an employer engaged in interstate commerce, in spite of Sec. 10 (a) of the National Labor Relations Act which makes the National Board's jurisdiction in this field

exclusive, the Wisconsin Supreme Court has decided a federal question of substance, not heretofore determined by this court.

(c) *The Wisconsin Supreme Court has decided an important federal question, not heretofore determined by this court, directly contrary to a decision on the same question by another state supreme court.*

In *International Brotherhood of Teamsters v. Riley*, 59 A² 476, decided by the New Hampshire Supreme Court on June 1, 1948, that court reached the conclusion that a state law regulating union security contracts could not be enforced against an employer in interstate commerce, since the field of the employer's labor management relations had been pre-empted by the National Act.

(d) In the case of *La Crosse Telephone Corp. v. Wis. Employment Relations Board*, Case No. 701 in the October 1947 docket of this court, an appeal is presently pending which involves a related subject, namely whether the State Board has jurisdiction to conduct a representation proceeding at a company in interstate commerce where the National Board has never exercised its jurisdiction over the company. The instant case presents a question not involved in the La Crosse case, since in this case the National Board had exercised jurisdiction respecting the labor relations of the parties.

The instant case should be considered in conjunction with the La Crosse case and this merits the granting of the writ in this case.

V.

PRAYER FOR WRIT OF CERTIORARI

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of the Supreme Court directed to the Wisconsin Supreme Court commanding that court to certify and send to the Supreme Court a full and complete transcript of the record and of the proceedings of the said Wisconsin Supreme Court in the case numbered and entered in its docket, No. 189, August Term, 1947, *Wisconsin Employment Relations Board, Plaintiff, vs. Algoma Plywood & Veneer Co., Defendant*, to the end that it may be reviewed and determined by the Supreme Court, as prescribed by the statutes of the United States; and that the judgment entered therein on May 11, 1948 be reversed and that petitioner have such further relief as may be proper.

Dated, Milwaukee, Wisconsin, July 31, 1948.

ALGOMA PLYWOOD & VENNER CO.,
a corporation,

Petitioner,

By Roger C. Minahan
Victor M. Harding,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of Courts Below

The opinion of the Wisconsin Supreme Court is reported in 252 Wis. 549, 32 NW 417.

The opinion of the Circuit Court of Kewaunee County, Wisconsin, is not officially reported, but appears in 14 Labor Cases (C. C. H.) No. 64,253.

II.

Jurisdiction

1. The date of the final judgment to be reviewed is May 11, 1948. The mandate was issued May 11, 1948.

2. The statutory provision which is believed to sustain the jurisdiction of the Supreme Court is Sec. 237 (b) of the Judicial Code (28 U. S. C. §344(b)), which authorizes this court to review the final judgment of the highest court of a State where there is drawn in question the validity of a State statute on the ground of its being repugnant to a federal statute.

III.

Statement of the Case

Algoma Plywood & Veneer Co. is engaged in the manufacture of plywood and veneer at Kewaunee, Wisconsin. About 95 per cent of its product is sold in interstate commerce (R. p. 24). Following a bargaining election conducted in 1942 by the National Labor Relations Board at the Algoma plant, Local 1521 of the Carpenters and Joiners Union (A. F. L.) was certified as bargaining agent and the Company thereafter dealt with it as the bargaining representative of all production employees (R. p. 19, 56).

In 1943 the Company and the Union negotiated a contract containing a provision requiring members of the Union to maintain their membership as a condition of employment, without an election conducted by the Wisconsin Employment Relations Board (R. p. 19-20, 56). The same provision appeared in succeeding contracts. A union member, Moreau, failed to pay his dues and at the Union's demand was discharged by the Company in January, 1947. Moreau filed a complaint against the Company with the Wisconsin Employment Relations Board (R. p. 12), and the Company was charged by the Board with a violation of Sec. 111.06 (1)(c) of the Wisconsin Statutes, the applicable portions of which provide:

> "It shall be an unfair labor practice for an employer —to encourage—membership in any labor organization —by discrimination in regard to hiring, tenure or other terms of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds

of such employees voting—shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board—."

The Wisconsin Employment Relations Board found that the Company had committed an unfair labor practice in violation of the state statute and ordered the Company to reinstate Moreau and to cease and desist from giving any effect to the maintenance of membership provision of its labor contract without a two-thirds vote of its employees (R. p. 7-10).

The case was then carried for review to the Circuit Court of Kewaunee County where both the Company and the Union contended that the State Board was without jurisdiction to deal with unfair labor practice charges against the Company (R. p. 46), since not only did Sec. 10 (a) of the National Labor Relations Act make the National Board's jurisdiction "exclusive," but also the National Board had already pre-empted the field of the Company's labor relations by conducting a certification proceeding out of which the labor contract and maintenance of membership provision evolved.

The Circuit Court decided the federal question against the Company and the Union (R. p. 46-7) and its judgment on this aspect of the case was affirmed by the Wisconsin Supreme Court on May 11, 1948 (R. p. 55-56).

Another point in the case was whether the Company should be required to reinstate Moreau with or without back pay. This question is not involved in the Petition for Writ of Certiorari.

IV.

Specification of Errors

1. The court below erred in holding that the State Board may take jurisdiction of an unfair labor practice case against an employer in interstate commerce, in spite of Sec. 10 (a) of the National Labor Relations Act which makes the National Board's jurisdiction in this field exclusive.

2. The court below erred in holding that the State law was not repugnant to the National law, when the state law makes a maintenance of membership provision illegal without a two-thirds vote of employees, whereas the National Act provides that nothing in that Act shall preclude an employer from entering into such a provision with the union representing his employees.

3. The court below erred in holding that the representation proceeding conducted at the Company's plant by the National Board did not oust the State Board of jurisdiction over the Company's labor management relations.

V.

Argument

1. *Sec. 10 (a) of the National Labor Relations Act, which makes the National Board's power to prevent unfair labor practices exclusive* (29 U. S. C. A. par. 160), *makes inapplicable to employers in interstate commerce any state law dealing with employer unfair labor practices.*

In this case the employer is charged with the commission of an unfair labor practice under state law, which would not be an unfair labor practice under the National Act. The alleged unfair labor practice is the employer's adherence to a maintenance of membership provision in his labor contract, a practice which is clearly not an unfair labor practice under the National Act. Thus, the effect of the State Board's order in this case, requiring the employer to cease and desist from observing this provision of his contract, is to encroach upon the domain of the National Board whose jurisdiction is expressly made *exclusive* by Act of Congress.

The application of Section 10 (a) of the National Labor Relations Act to State Unfair Labor Practice Laws has not been passed upon by this court, and warrants the granting of the Writ in this case.

2. *Sec. 111.06 of Wisconsin Statutes is inconsistent with Sec. 8 (3) of the National Labor Relations Act and is, therefore, unenforceable against an employer in interstate commerce.*

Sec. 8 of N. L. R. A. (29 U. S. C. A. par. 158) defines employer unfair labor practices and provides at subsection (3):

> "Provided that nothing in this Act . . ., or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization—to require as a condition of employment membership therein—."

Sec. 111.06 (1) of the Wisconsin Statutes sets forth employer unfair labor practices and at subsection (c) 1 provides:

> "Provided, that an employer shall not be prohibited from entering into an all-union agreement with the representative of his employees in a collective bargaining unit, when at least two-thirds of such employees voting—shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board."

Thus, the National Act says that the employer and union shall be free to enter into an all-union contract, whereas the State Act says that they can only enter into such a contract after a referendum has been held by the State Board at which at least two-thirds of the employees signify their approval.

To illustrate the inconsistency, let us consider actual collective bargaining negotiations between a Wisconsin employer engaged in interstate commerce and a union which has just been certified as the bargaining agent by the National Board. The Union requests the inclusion in the contract of a maintenance of membership provision. The employer is then placed in this dilemma:

1. If he says "yes" (which is what the employer said in this case), then he subjects himself to possible later charges that he has committed an unfair labor practice under State law, since no referendum has first been conducted by the State Board.

2. If he says "no," or "not unless the State Board conducts a referendum and at least two-thirds of the men ap-

prove," then he subjects himself to charges of "refusing to bargain" under the National Act, and the Union may go directly before the National Board and secure an order directing the employer to cease and desist from refusing to bargain.

The National Board would consider such a refusal on the part of an employer as an unfair labor practice, because there is nothing in the National Act which permits an employer to refuse to bargain on such a subject. On the contrary, the National Act contains an express recognition of such a union security provision.

See: *Eppinger & Russell Co.* (1944) 56 N. L. R. B. 1259

Tampa Electric Co. (1944) 56 N. L. R. B. 1270.

We submit that an employer should not be placed in such a dilemma by the existence of State and National laws which do not coincide. If the employer in this case had taken the other horn of the dilemma and refused to bargain with the Union on a union security provision without a state-conducted election, the employer would in all probability have been found by the National Board to have committed a violation of the National Act, and this same question would be presented to this Court in a different way. The question would then be: Is the existence of the State requirement of a referendum a valid defense to an employer who is charged with a refusal to bargain under the National Act?

In this case the employer chose the alternative which would best preserve harmony in his plant. Rather than become involved in a dispute with the Union, the employer chose the course which led to litigation with the State Board.

In whatever way this question comes before this court, however, the inconsistency between the State and National Acts is apparent. In the light of this inconsistency the State Act must yield.

In *Allen Bradley Local v. Wis. Employment Relations Board*, 315 U. S. 740, this court held that the State Act could properly operate in the field of preventing unfair labor practices by *employees*, because the National Act did not attempt to regulate in that field. The court added this significant qualification, at P. 751:

> "If the order of the State Board—caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

Now we have a case where the State Board's order does cause "a forfeiture of collective bargaining rights," since it orders the employer to cease and desist from observing the maintenance of membership provision in its contract with the union until a referendum has been conducted by the State Board and the requisite number of employees approve it. (R. p. 9)

In *Hill v. Florida*, 325 U. S. 543 this court struck down a state statute requiring unions and business agents to secure licenses or permits before functioning as bargaining agents. This law was held to interfere with the right granted to employees by the National Act to freely choose their bargaining agent.

By the same token in this case, the union's right to bargain collectively with the employer, given to it by the National Act, has been circumscribed by the State Act which requires that the State Board shall first conduct a

referendum and two-thirds of the employees must consent, before the Union can bargain collectively on the subject of Union Security.

The failure of the Wisconsin Supreme Court to apply properly the principles of these cases is justification for the granting of the Writ in this case.

3. *The effect of the National Labor Relations Board conducting an election at the Algoma plant and certifying the Union as the bargaining agent, was to oust the State Board of jurisdiction over the labor relations of the parties.*

In *Bethlehem Steel Co. v. N. Y. Labor Board*, 330 U. S. 767, this court held that a State Board could not operate in the field of labor relations of the parties where the National Board had asserted its jurisdiction in the industry in which the employer is engaged. At P. 776 appears this language:

> "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

Thus even though the State Board functioned in a way which was consistent with the policies of the National Board, this court has held that a State Board may not conduct representation proceedings in an industry engaged in interstate commerce.

So here, the National Board took jurisdiction over the labor relations of the Company and the Union in this case

by certifying the Union as bargaining agent (R. p. 19). In the collective bargaining between the parties which followed that certification, the State Board may not interfere.

The Wisconsin Supreme Court's refusal to follow the ruling of this court in the Bethlehem Steel Co. case warrants granting the Writ in this case.

4. *The Supreme Court of New Hampshire has decided the same federal question involved in this case directly contrary to the decision of the Supreme Court of Wisconsin.*

In *International Union of Teamsters, etc. v. Riley*, 59 A. 476, the New Hampshire court held that a New Hampshire statute, requiring an employer referendum by two-thirds to validate a union security clause, was fatally inconsistent with the Taft-Hartley Act which only requires a majority vote of employees. In the language of the Court at P. 479:

> "A comparison of those provisions with those of the Taft-Hartley Law dealing with unfair labor practices (s. 8), demonstrates that the two acts deal with the same subject matter in much the same way. There are, however, many conflicts between the provisions of the Taft-Hartley Act and the Willey Act. . . . In regard to the union shop under which an employer may hire non-union men of his own selection who, after a probationary period of employment must become union members as a condition of further employment, the Taft-Hartley Act permits such agreements when a majority of employees vote in favor of it, while the Willey Bill requires a two-thirds majority to validate such contracts. Numerous other inconsistencies between the two acts are pointed out in the excellent brief of the petitioners.

> "The Constitution of the United States gives Congress jurisdiction over the entire field of interstate commerce, and since Congress has already pre-empted the subject of labor management relations within the field of interstate commerce, it follows from the paramount character of its authority that state regulation of the subject matter is excluded."

The provision of the National Act, Sec. 14 (b), which expressly recognized the validity of state laws prohibiting such union security provisions, was held not to sustain the New Hampshire law because the State law regulated rather than prohibited such provisions.

The instant case involves the National Labor Relations Act before amendment by the Taft-Hartley Act. A fortiori, the New Hampshire Supreme Court would have decided that the New Hampshire Law conflicted with the original National Labor Relations Act since that law, before its amendment, contained no provision recognizing the validity of state legislation in the same field.

To resolve the conflict between the decisions reached by the Wisconsin and New Hampshire Supreme Courts on this federal question, this Court should grant the Writ.

For the foregoing reasons it is submitted that this case is one which calls for the exercise by the Supreme Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the decision of the courts below.

Respectfully submitted,

ROGER C. MINAHAN,
VICTOR M. HARDING,
Counsel for Petitioner.